Alpha's service on 931.9625, in July, 1992 Alpha filed a set of applications to geographically expand its licensed 931.9625 MHz system by adding additional, co-channel base stations over a wider area. In June 1993, Alpha filed a further application, to improve signal penetration inside a hospital within the service area of its licensed Tracy Towers station (which further application is hereinafter referred to as the "Bronx Lebanon Hospital application.") The party who had filed a petition for reconsideration against Alpha's grant also filed petitions to deny Alpha's aforementioned expansion applications and the Bronx Lebanon Hospital application.

6. Alpha opposed the petition for reconsideration and the petition to deny on procedural and substantive grounds, and replies were filed. These matters, as well as Alpha's expansion applications and Bronx Lebanon Hospital Application, remain pending two years later[3/].

7. In the FNPRM, the Commission proposes to revise its processing procedures for 931 MHz applications, and to apply the revised procedures retroactively to "pending applications" and "applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review" (hereinafter "Protested Licensees"). As Alpha has pend-

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[3/]The MSD granted the Bronx Lebanon Hospital application by FCC Public Notice, Report No. PMS 93-40, dated July 7, 1993 (FCC File No. 26302-CD-P/ML-01-93), but the grant was rescinded by Letter dated July 13, 1993 (Ref. 1600D-ALW) and the application was returned to pending status. An application for review is pending.

ing 931 MHz applications, as well as grants that are subject to a reconsideration petition, the proposed retroactive adoption of the Commission's proposal would directly and substantially effect Alpha. Under these circumstances, Alpha is an "interested" person for purposes of participating in this proceeding.

ARGUMENT

8. This proceeding was instituted two years ago, to completely overhaul Part 22 of the Commission's rules governing the PLMS. Revision of Part 22 of the Commission's Rules Governing The Public Mobile Services, CC Docket No. 92-115, "Notice of Proposed Rulemaking," 7 FCC Rcd 3658 (1992) ("NPRM"). The NPRM ran approximately 100 pages, and dozens of comments were filed. The Commission has now issued its FNPRM, which introduces, inter alia, a change in the rule for processing 931 MHz applications, not initially proposed in the NPRM. The Commission has not appended to the FNPRM suggested language for this belated rule proposal. However, the key elements of the processing change were described by the Commission at paragraphs 15-17 of the FNPRM as follows:

> - All pending 931 MHz applications, plus all 931 MHz applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review, would be required to be amended to specify a particular frequency[4/];
>
> - Applicants would be required to amend to a frequency that was available at the time the "application" was filed;

[4/]Under the current rules, applicants for an initial channel do not specify the frequency they are seeking, but may specify a non-binding frequency preference. Rule Section 22.501(p)(2)(i).

- Formal FCC Public Notice of the "applications," as amended to specify frequency, would be republished;

- New 931 MHz applications mutually exclusive with the amended "applications" could be filed during the 30-day period following the republication of Public Notice;

- Mutual exclusivity would be resolved through competitive bidding or lotteries.

9. The Commission suggests that its purposes underlying this most recent proposed rule change are "to reduce the number of cases involving mutually exclusive applicants, and to expedite the processing of applications[5/]" and "to process these applications in a consistent, satisfactorily [sic] manner[6/]." However, retroactive application of these changes to pending applications, as well as to applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review ("Protested Licensees") will impel exactly the opposite effect.

A. Retroactive application will result in a denial of due process.

10. The pending applications, some of which have been before the Commission for close to a decade, would appear to have been cut-off long ago from any risk of further mutually exclusive filings, under Section 309(d) of the Communications Act, Section 22.31 of the Commission's rules, and the protections afforded by the Courts in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), and its progeny. To again expose these applications, many years

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[5/] FNPRM, para. 12.

[6/] FNPRM, para. 15.

later, to the possibility of conflicting filings, would work violence against concepts of orderly and fair licensing, and would undermine assumptions of regularity and integrity in the Commission's licensing processes.

11. Even more manifestly unjust would be retroactive application of the proposed rule change to applications that have already been granted or are the subject of petitions for reconsideration or applications for review not yet finally adjudicated, i.e. the Protested Licensees (such as Alpha), who, in diligent exercise of their regulatory obligations, over the years have expended substantial resources to construct and place in operation their authorized 931 MHz systems. The proposed rule change will operate as an ex post facto law, arbitrarily and unexpectedly subjecting the Protested Licensees to potential loss of their facilities without according a final adjudication of the outstanding legal challenges. Although the outstanding litigation has prevented administrative "finality" of the Protested Licensees' grants, and thus has undermined total certainty, it would be improper for the mere filing of a protest to result in a forfeiture by the Protested Licensees without the benefit of reasoned consideration of the issues by the agency.

B. Retroactive application will disserve the public interest.

12. Retroactive application of the proposed rule change also would be contrary to the public interest in continuity of communications service. For example, for two years Alpha has operated 931.9625 MHz in New York, and 931.9625 MHz is the only

frequency on which Alpha is authorized to provide service in the area. Should Alpha abruptly lose its licensed channel to a mutually exclusive applicant pursuant to the proposed rule change, displaced customers would have to scramble for alternative communications service in the ensuing upheaval.

C. **Retroactive application will result in dissimilar treatment of similarly situated parties.**

13. Alpha is one of five applicants who were awarded frequencies in the New York area by the June 24 Letter, infra, which approved a settlement of litigation in Lottery No. PMS-31. As noted at paragraph 4, infra, none of the grants made by the June 24 Letter became final, as a result of petitions for reconsideration filed against some of the grants, including Alpha's grant. However, the Commission's description of the proposed rule change to the Protested Licensees is peculiarly and narrowly worded to apply not to all non-final grants in the 931 MHz band, but rather, only to grants which, specifically, "are the subject of petitions for reconsideration or applications for review."

14. This tortuously worded rule would precisely target Alpha for treatment disparate from that accorded other PMS-31 settlors. Such a result would be irreconcilable with the equal protection component of the Fifth Amendment and Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965). See also New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361 (D.C. Cir. 1987) (recognizing "the importance of treating parties alike when they participate in the same event or when the agency vacillates without reason in its application of a statute or the implement-

ing regulations"); Public Media Center v. FCC, 587 F.2d 1322, 1331 (D.C. Cir. 1978).

D. **The Commission's proposal is a bill of attainder.**

15. The Commission's proposal to narrowly tailor its retroactive application of the rule change, so as to apply not to all non-final grants, but rather, only to those non-final grants which are the subject of petitions for reconsideration or applications for review, smells like a constitutionally-offensive bill of attainder, directed specifically against Alpha as opposed to all non-final grantees in PMS-31. The proposed rule would narrowly and punitively bar Alpha, ex post facto, from continuing to provide 931.9625 MHz service, for the ostensible crime of being the subject of a petition for reconsideration perceived by the Commission as burdening its licensing process, and without adjudication of the issues addressed in the petition. The Commission is well aware of the proposed rule's narrow retroactive applicability to Alpha. Indeed, the Commission cites PMS-31 repeatedly in the FNPRM in justification of its proposal for a retroactive rule change at this juncture[1/].

16. Bills of attainder are unconstitutional. U.S. Const., Art. I, §9, Cl. 3. The U.S. Court of Appeals for the District of Columbia Circuit has previously vacated Commission actions which have impermissibly "singl[ed] out one or a few for uniquely disfavored treatment," in violation of the equal protection and bill of attainder clauses of the Constitution. News America

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[1/] See FNPRM, n. 22, 23.

Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988). In News America, the Court was constrained to remind the Commission that:

> ...nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation ... . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Id., quoting Railway Express Agency v. New York, 336 U.S. 106 (1949). Accordingly, the Commission's proposed retroactive application of the proposed rule would be improper under the circumstances. The Commission should reject that aspect of its rule making proposal, and afford Alpha the opportunity to be heard on the issues in a judicial context.

E. Retroactive application has not been justified.

17. The Commission's conclusion that the public interest in expeditious licensing and provision of service outweighs the proposed rule's potential unfairness to pending 931 MHz applicants fails to weigh the cost of additional relevant factors, including: likely loss of service to Protested Licensees' subscribers; the financial expense, loss of good, and other hardships to be suffered by Protested Licensees; and resultant damage to the integrity of the Commission's licensing processes.

18. The Commission makes no pretense, at paragraph 17, to disguise its true purpose for proposing a retroactive rule change -- to wit, administrative expedience. The Commission focuses on easier processing of "future" 931 MHz channel assignments, making no attempt to ensure that the effect of the rule change on pend-

ing applicants or the Protested Licensees is consistent with similarly situated parties or, more importantly, fair. Many of the pending applications and Protested Licensees were originally filed close to a decade ago, and, notwithstanding the processing of hundreds of contemporaneously or after-filed 931 MHz applications in the interim, retroactive application of a different, adverse procedure looms ahead only because the Commission, in derogation of its duties, has failed to act over many years on their particular matters[8/].

19. The Commission would rely on Storer Broadcasting v. FCC, 351 U.S. 192 (1956), and Hispanic Information and Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (1989), to justify retroactive application of its proposed rule change, notwithstanding any potential unfairness to pending 931 MHz applicants or the Protested Licensees. However, neither of these cases would support, as is presented in the context of PMS-31, a retroactive rule change which would revoke licenses of some but not all parties to a consolidated proceeding, for the primary purpose of making its application processing job easier. Rather, the cases involved challenges to rule changes by mere applicants, and the purposes of those rule changes were to protect important

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[8/]In this regard, the Commission should be mindful of the Court's authority to compel agency action that has been improperly withheld or unreasonably delayed. See e.g. Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 76-77 (D.C. Cir. 1984).

governmental and public interests[9/]. Even so, Justice Harlin, in his partial dissent in Storer, warned that he would have had a problem with the retroactive rule change in that case if the rule would have caused Storer to lose existing licenses rather than a mere future opportunity. Id. at 773, n2. The exact circumstance underlying Justice Harlin's concern is presented by the Commission's instant proposal in the context of PMS-31.

20. Moreover, the Commission's plan to resolve long-standing snarls of 931 MHz band mutual exclusivity by inviting additional mutually exclusive applicants would appear to evoke increased processing backlogs, as well as further litigation before the agency and the federal courts. It is hard to comprehend the rationale for Commission's seemingly wayward procedure.

SUGGESTED ALTERNATIVES

21. A fairer and more expedient alternative to the Commission's proposal would be instead to promulgate the change in the processing rule prospectively. There is no reason why applications presently pending which are not mutually exclusive and not subject to petitions to deny could not simply be untangled from the processing quagmire and acted on immediately -- without inviting a flood of new, mutually exclusive applications. Indeed, this would appear to be the swiftest way to bring new service to the public. The pending litigation involving 931 MHz band applications and grants should be disposed of through rea-

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[9/]For instance, Storer involved a rule which established caps on ownership of multiple broadcast stations, to prevent undue concentration of control of media.

soned decision-making, in accordance with the parties' statutory right to due process.

22. With respect to outstanding litigation and mutually exclusive applications in the 931 MHz band, the Commission has authority to offer an array of incentives, such as tax certificates, to encourage voluntary compliance with policy goals. See e.g. 26 U.S.C. §1071. The offering of such incentives could motivate mass voluntary dismissals of pending applications to more speedily alleviate processing gluts.

WHEREFORE, the premises considered, Alpha Express, Inc. respectfully submits that the Commission should decline to apply its proposed 931 MHz processing change retroactively, and should take other action as suggested herein.

Respectfully submitted,

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